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SUPREME COURT U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 374

UNITED ENTERPRISES, INC.,
Petitioner,

vs.

ANNE DUBEY, EVA A. LOWTHER, and LEE ORA BROWN, Being and Comprising the Members of the Florida State Board of Beauty Culture Examiners,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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ANNE DUBEY, EVA A. LOWTHER, and LEE ORA BROWN, Being and Comprising the Members of the Florida State Board of Beauty Culture Examiners,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petitioner respectfully shows:

I.

Summary and Short Statement of the Matter Involved.

This is an action for a declaratory judgment. The action was originally filed by the petitioner as plaintiff below in

the United States District Court for the Northern District of Florida, against the respondents, defendants below, who comprised the Florida State Board of Beauty Culture Examiners (Rec. 4). A declaratory judgment was sought, holding and declaring the Florida State Beauty Culture Law (Chapter 16800, Florida Acts of 1935, as amended by Chapters 20333 and 20860, Acts of 1941) inoperative and inapplicable to the business of the petitioner.

The cause was submitted to the trial court upon the pleadings and the agreed statement of facts filed by the counsel for the respective parties. Upon the 8th day of December, 1941, the trial court entered its order, denying the declaratory judgment prayed, and dismissed the petitioner's complaint upon jurisdictional grounds (Rec. 58). An appeal was perfected to the United States Circuit Court of Appeals for the Fifth Circuit, and upon the 16th day of June, 1942, said court entered its judgment affirming the United States District Court of the Northern District of Florida, said opinion affirming the cause solely upon the merits (Rec. 72).

The submission of this cause upon the pleadings and the agreed statement of facts placed before the trial court the following facts: Stated concisely, the allegations of the complaint (Rec. 4-17) were:

The petitioner, an Indiana corporation, manufactured cosmetics there, and was engaged in interstate commerce in the sale of same through representatives in the State of Florida, and there pursued a direct sales method of giving a free demonstration of their products to prospective customers. The complaint alleges that these sales demonstrations of petitioner's products to prospective purchas-

ers in Florida consisted of the application of a portion of "cold cream" or "facial cream", which is applied to the face of the prospective customer, and removed, along with a like application of a "liquid skin softener", a "powder base", "powder, rouge and lipstick". This demonstration is made without charge or obligation to the prospective purchaser, and the only profit derived by the petitioner is from the possible sale of cosmetics to such prospective purchaser, and if sold, the same is shipped from Evansville, Indiana, by parcel post C. O. D. direct to the customer in Florida.

The complaint alleges a controversy arose between the petitioner and the respondents, the State Board of Beauty Culture Examiners of the State of Florida, regarding the application of the Florida Beauty Culture Law to the business of the petitioner, said respondents taking the position that under the terms of said Florida law that it was necessary that representatives of the petitioner have certificates of registration issued by said Board as provided by said Florida Beauty Culture Law.

The material portions of said Florida Beauty Culture Law are set out in the complaint (Rec. 7-12). Among others, said Florida Beauty Culture Law provides that it shall be unlawful for anyone to engage in the practice of beauty culture without a certificate of registration issued pursuant to the provisions of the Act, by said Board. Said Act also provides that the application of cosmetic preparations, antiseptics and powders to the face or neck constitutes the practice of beauty culture. In order that a person be qualified to receive a certificate of registration, he must have practiced as a *registered junior operator* for a period of twenty-four months under the personal supervision of a registered beautician. (Modified by amend-

ment of 1941 and set out in the printed record under the agreed statement of facts (Rec. 39), Section C of the Act. Period reduced by 1941 amendment to 12 months.)

Such person must also have passed a satisfactory examination conducted by the Board to determine his fitness to practice beauty culture, which includes practical demonstrations in shampooing the hair, hair-dressing, marcelling, permanent waving, water waving, hair coloring, manicuring, facial massage and scalp massage, with the hand; written and oral tests in antiseptics, sterilization, sanitation and the use of mechanical apparatus, and electricity as applicable to the practices of the occupation of a beautician, and may include such other demonstrations, and tests as the Board in its discretion may require. To become a *registered junior operator*, a person must be graduated from a school of beauty culture approved by the Board and must have passed a satisfactory examination which shall cover the practices outlined above. The Act defines a school which could be approved by the Board, and sets up the requirements in respect thereto. A course of study and instruction is prerequisite to graduation from such a school of not less than 1000 hours of continuous study within a period of 12 months, and not less than 6 months, which course of instruction is to include the followings subjects:

> "Scientific fundamentals for beauty culture, physiology, hygiene, elementary chemistry relating to sterilization and antiseptics, managing and manipulating the muscles of the face, neck and scalp, hair cutting, bobbing, hair trimming, and dyeing the hair, shop management and business methods, facial and scalp massages, or treatments with oils, creams, lotions or other preparations, shampooing, singeing, or applying hair tonics, applying cosmetic preparations, antiseptics, powders, oils, clay or lotions to scalp, face or neck.

"Hairdressing or the arranging, waving, dressing, curling, cleansing, thinning, cutting, singeing, bobbing, bleaching, tinting, coloring, straightening, dyeing, brushing, beautifying or otherwise treating by any means the hair of any person.

"Manicuring or the cutting, trimming, polishing, tinting, coloring, cleansing, or manicuring the nails of any person, and massaging, cleansing, treating, or beautifying the hands of any person.

"Permanent waving, or the preparing, arranging, curling, cleansing, and treatment of the hair for curling, by the use of permanent waving machines, mechanical appliances or chemical heat devices or heat materials.

"Removing superfluous hair from the body of any person by the use of electrolysis, or by the use of depilatories, by the use of tweezers, chemical preparation, or by the use of devices or appliances of any kind or description, except by the use of light waves commonly known as rays. * * * "

The Act provides the fees which an applicant must pay to the Board, and also provides that the violation of the Act shall constitute a misdemeanor, and upon conviction be punishable by fine and imprisonment.

That in the controversy above referred to, the petitioner took the position that in performing the demonstration of cosmetics, their sales persons were not in reality engaged in the practice of cosmetology or beauty culture. That their said business constituted interstate commerce. That said Act of the State of Florida placed an unreasonable burden upon petitioner's interstate business, and was not a valid exercise of the police power of the State of Florida with respect to the acts and demonstrations aforesaid, and therefore said Act violates Article I, Section 8, Clause 3 of the Constitution of the United States, and that the re-

quirements of said Act, if construed to apply to the appellant's representatives, the same would place an unreasonable burden upon said representatives of the appellant in requiring that said representatives be licensed and registered to practice several branches of beauty culture in which they do not claim or intend to be proficient, and which they do not attempt to practice, in order that they be permitted to perform the acts and demonstrations aforesaid, and said Act is therefore violative of the Fourteenth Amendment of the Constitution of the United States. The complaint also alleges that said controversy resulted in the arrest of said representatives in Florida, and in continued threats of arrests and prosecutions of petitioner's said representatives, creating such a state of affairs that it was impossible for the petitioner to continue to do business within the State of Florida. Allegations are contained in the complaint that petitioner had regularly employed five to seven representatives in the State of Florida who were not licensed, and all of whom in their sales practices, gave demonstrations of petitioner's products, and prior to the interference and intimidation of petitioner's employees, they did regularly produce sales of cosmetics resulting in a regular average profit to the petitioner in the sum of four hundred dollars ($400.00) per month, or forty-eight hundred dollars ($4,800.00) per year, and that except for said interference, prosecutions and arrests upon the part of said Board, the petitioner would have continued to do business in a like volume with the same resulting profit through the balance of 1940 and 1941, and thereafter. The complaint also contains allegations that it is not possible for the petitioner to draw its sales representatives from those licensed under the provisions of the Act. That the number of persons so licensed is limited, and said number so licensed does not include a sufficient number so inclined or

interested, and with the necessary sales ability, and if the petitioner were limited in the selection of its representatives to those licensed under the Florida Act, it would be impossible for the petitioner to employ suitable representatives in the State of Florida to carry on its business under the sales practices herein outlined, all with the resulting financial injury as above stated.

By the complaint, the petitioner sought a declaratory judgment, decreeing the Florida law inoperative and inapplicable to the business of the appellant, and that said Act be declared unconstitutional, and for all other relief.

Stated concisely, the allegations of the respondents' answer to the petitioner's complaint in the trial court herein, four defenses were stated (Rec. 18-24) as follows:

The first defense raises the question of jurisdiction. The second defense denies the allegations of the complaint, justifies the exercise of the police power of Florida under the Act in question upon consideration of public health, sets up specific violations of this Act by representatives of the petitioner, and denies that an unreasonable burden upon petitioner's interstate business results from the enforcement of the Act. The third defense avers that an adjudication of this controversy in favor of petitioner will operate to enjoin or suspend the enforcement of the orders of said Board of Beauty Culture contrary to the terms of Subsection 1, of Section 41, Title 28, United States Code. The fourth defense avers that an adjudication of this controversy will operate to enjoin the collection of a tax imposed by Florida contrary to Sub-section 1 of Section 41, Title 28 of the United States Code.

So far as is material the agreed statement of facts filed by the parties provides (Rec. 25-57):

"That the allegations of fact only stated in plaintiff's amended complaint relating to the amount and extent of its present and future business in the State of Florida are true."

Said agreed statement of facts also contained the following:

"That the activities of plaintiffs agents and 'demonstrators' within said State of Florida objected to, or opposed by, or under the authority of, said defendant Board, and on account of which this suit was brought and is now pending and which constitute the sole and only dispute and controversy between the parties hereto, are: plaintiff's sales representatives engaged a number of women to work as 'demonstrators' in various beauty shops in Florida where plaintiff desired to establish trade outlets for its said cosmetic products. These 'demonstrators' were first given a two weeks' course of training by the sales representatives in the application and use of plaintiff's merchandise upon prospective customers. They were then furnished with a 'kit' containing the creams and preparations necessary to the giving of the demonstrations hereafter described. The 'kit' size contained a spatula for removing the creams from the jars in which they were packed when giving the demonstrations and an eyebrow brush for applying 'makeup' to the eyes of the customer, if requested. The 'demonstrator' was required to further equip herself with small cloths or towels to be used as headbands. These were arranged upon the customer to protect her hair from the preparations used in the demonstration.

"The sales representative and one of the 'demonstrators' then entered a beauty shop with this proposal to the shop owner or operator: The 'demonstrator' would remain in the shop for a short time, giving demonstrations of plaintiff's merchandise to prospective customers and promoting its sale. These would be drawn from women casually entering the shop or brought there by special appointment. In order to in-

duce the prospect to buy, the 'demonstrator' would propose that she give to the prospect a demonstration in the use of the merchandise. The materials in the 'kit' were used. The prospect would be taken into one of the regular booths maintained in the shop for giving beauty treatments. She would be placed in a reclining position in a regular reclining chair or couch, commonly known as a 'facial' couch. Towels (furnished by the shop) would be adjusted about the shoulders and body of the prospect. One of the 'demonstrators' headbands would be put in place. The demonstration then proceeded in this manner:

"(1) Plaintiff's merchandise, known as a cleansing cream, would be applied over the entire face with spreading and stroking movements, then all of it would be removed with tissue.

"(2) Another of plaintiff's preparations known as a special throat cream and eye cream would be placed over the throat and eyes.

"(3) The remaining portion of the face would be covered with another of plaintiff's preparations known as a 'skin food'.

"(4) The face was then gently manipulated with the fingers.

"(5) Over this would be placed another of plaintiff's preparations consisting of a white cream or 'clay' and known as a 'beauty pack.' This was allowed to dry for eight or ten minutes.

"(6) It was then thoroughly removed with cloths soaked in warm water.

"(7) An astringent lotion or cream was then smoothed over the face.

"(8) The 'demonstrator' then applied 'make up' consisting of face powder, rouge on the cheeks and lipstick on the lips. If the customer desired, 'make up' was placed about the eyes.

"This entire process was conducted by the 'demonstrator' and the materials used were those manufactured by the plaintiff. It consumed from forty to forty-five minutes. It is what is known in the beauty trade as a 'facial' and is given for the purposes of beautification. No charge was made, but if there was a sale, an order was taken and a cash deposit was given to the 'demonstrator' who kept it as her own. This obligates the plaintiff to make delivery of said specified merchandise and provides that the cosmetics purchased will be mailed to the purchaser C. O. D. direct from Evansville, Indiana, by parcel post. The deposit which is paid to the 'demonstrator' constitutes part of the purchase price, and is retained by the salesman or 'demonstrator' as her commission in full. The balance of the purchase price is collected by the Postal Authorities on the delivery of the merchandise by Parcel Post upon a C. O. D. basis. Full payment of the merchandise is not accepted from the purchaser in advance. A copy of the order blank is left with the purchaser, and the other copy is sent by the representative to the Evansville, Indiana office of the plaintiff, and there the merchandise so ordered is packed and shipped by parcel post C. O. D. direct to the purchaser.

"The shop owner was given a sales credit which might be used in purchasing a stock of goods for sale direct from the shop in the ordinary course of business. Many shops now have plaintiff's merchandise on sale, some of which was purchased following demonstrations, while other shops have acquired a stock of goods independently of any such demonstrations.

"The 'demonstrators' did not obtain certificates of registration provided for by the Florida Beauty Culture Law and hence were arrested pursuant to order of the defendant Board, and such arrests will be repeated pursuant thereto in the event of similar future activities. Neither of said 'demonstrators' had completed the course of study required by such Act in a school of beauty culture approved under the provision thereof, nor had either practiced as a registered junior operator for the period required in said Act and under the conditions therein prescribed, nor had either furnished to defendant Board health certificate required thereby, and said 'demonstrators' have refused to pay the fees prescribed by said Act. Said 'demonstrators' were, and are, thereby hindered, prevented and stopped from carrying on plaintiff's business under the sales practices as above described."

Said agreed statement of facts also contained the following:

"That said 'demonstrators' or sales person of the plaintiff do not advertise or hold themselves out as licensed or registered beauticians under said Florida Beauty Culture Law, or as practicing or engaging in any of the following specific practices:

"1. Cutting or bobbing the hair.

"2. Scalp massage.

"3. Singeing, shampooing or dyeing the hair or applying hair tonic.

"4. Hairdressing or the arranging, waving, dressing, curling, cleansing, thinning, cutting, singeing, bobbing, bleaching, tinting, coloring, steaming, straightening, dyeing, brushing, beautifying, or otherwise treating by any means the hair of any person.

"5. Manicuring, or the cutting, polishing, tinting, coloring, cleansing or manicuring the nails of any person.

"6. Permanent waving or the preparing, arranging, curling, cleansing, and treatment of the hair for curling, by the use of permanent waving machines, mechanical appliances or chemical heat devices or heat materials."

II.

Statement of Jurisdiction.

The Supreme Court of the United States has jurisdiction to review the decision in this cause of the United States Circuit Court of Appeals for the Fifth Circuit, under the provisions of Section 240(a) of the Judicial Code of the United States, 28 U.S.C.A. 347(a):

Jurisdiction in this cause of action in the Federal Courts is predicated upon the Judicial Code of the United States, Section 24 as amended, United States Code Annotated, Title 28, Section 41, jurisdiction being based upon diversity of citizenship, and the amount of value of the subject matter or right being litigated being in excess of the sum of three thousand dollars ($3,000.00).

The United States District Court for the Northern District of Florida, by its written opinion, held it was without jurisdiction (Rec. 59-62). However, the United States Circuit Court of Appeals for the Fifth Circuit held the jurisdictional question was improperly determined by the trial court, and said United States Circuit Court of Appeals in its opinion said (Rec. 70):

> "The question of federal jurisdiction is reached first, and we think it must be decided in favor of appellant. The complaint alleges that the yearly profits of the corporation from its business in Florida amounted to $4800, and that, if appellees continued to regulate its employees and its business under the statute, it would be forced thereby to discontinue its

business in the state as carried on by means of the demonstrations, and, as a consequence thereof, it would sustain damages in excess of $3000. There is no claim that this allegation was not made in good faith, nor that the appellant's right to do business in Florida is not worth more than $3000. The value to appellant of the right to transact its business freed from the restraint of the statute is determinative of the amount in controversy, which value is fixed by the *ad damnum* clause of the complaint, asserted in good faith, at a sum sufficient to confer jurisdiction upon the court below."

As further sustaining the jurisdiction of the Supreme Court of the United States of America upon the within petition for certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, this cause of action upon its merits presents a Federal constitutional question of gravity and general importance. This said constitutional question was raised in the first instance by the complaint and said constitutional question relating to the merits of this controversy upon which this cause was tried in the United States District Court for the Northern District of Florida, and upon appeal in the United States Circuit Court of Appeals for the Fifth Circuit. This constitutional question was as follows: Petitioner, by its complaint for a declaratory judgment, sought to have the Florida Beauty Culture Law declared inapplicable to its business in the State of Florida, or, if applicable, violative of Article 1, Section 8, Clause 3, of the Federal Constitution, and the Fourteenth Amendment thereto, thereby specifically questioning said statute of the State of Florida as being a proper exercise of the police power of that State. The question so raised brings the inquiry to a determination of whether the enactment of the Florida Beauty Culture Law, concededly in the interest of the public health, bears any real and substantial relation to that problem as it is

particularly applied to the interstate business of the petitioner in the State of Florida. The petitioner herein has throughout this cause of action taken the position that the enactment of the State of Florida so considered, constitutes an unreasonable burden upon petitioner's interstate business, contrary to the Federal Constitution. The trial court, and the Circuit Court of Appeals have erroneously failed to sustain the position of the petitioner, and this presents a question of gravity and importance in that it involves the ever-increasing effort upon the part of the States to establish state barriers, and the ever-increasing effort upon the part of the States to impose upon simple trades and professions despite the interstate character of their business, arbitrary and unreasonable restrictions.

III.

Questions Presented.

This petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit questions the correctness of their decision and judgment in this cause of action on the merits, whereby the decision and judgment of the United States District Court for the Northern District of Florida was affirmed. The petitioner herein takes the position that said decision of said Circuit Court of Appeals is erroneous in that it holds the Florida Beauty Culture Act, as applied to the interstate business of the petitioner, is a valid exercise of the police power of that state, and violates and transgresses no Federal constitutional limitations. This erroneous holding and decision is entered in this cause despite the fact that the evidence reveals without dispute that the petitioner's business in Florida is interstate in character; that the free demonstrations of petitioner's products, consisting of the application of a small portion of cold cream to the face of another, is but

a mere incident to a prospective sale of petitioner's products. That petitioner's representatives are salesmen, not beauticians, and do not hold themselves out as such. This petition presents the proposition that said decision is erroneous in failing to hold that the application of said Florida beauty culture law to the business of petitioner, and to its representatives in requiring said representatives to obtain certificates of registration as required by said Act, when as a prerequisite to obtaining such a certificate by specific provision of said Act, to be qualified, a person must have spent as an apprentice (Rec. 39), twelve months under the supervision of a registered beautician, and have previously spent more than six months and a thousand hours of study, and have graduated from a school of beauty culture wherein the course of instruction was devoted to the study of a variety of more than 75 unrelated subjects. (See Section 7 of the Act, in the Record at page 42). For example, an applicant must have become proficient in the art of hair-straightening. The study of these unrelated subjects for a period of more than 18 months, constituted an unreasonable and arbitrary burden upon the petitioner's business, and constituted a regulation having no reasonable or substantial relation to the public health problem purportedly involved.

IV.

Proceedings in the Trial Court.

This cause was submitted to the trial court, the United States District Court for the Northern District of Florida, upon petitioner's amended complaint (Rec. 4017), the answers of the respondents (Rec. 17-25), and upon the agreed statement of facts of the parties, filed with the court (Rec. 25-57). Upon the 8th day of December, 1941, the trial court entered its order denying the declaratory judgment,

and dismissing the complaint of the petitioner on jurisdictional grounds (Rec. 57).

The Opinion of the Trial Court.

The opinion of the trial court is set out in the Record, pages 59-62, and is reported in 42 Federal Supp. 60.

V.

The Decision of the United States Circuit Court of Appeals for the Fifth Circuit.

The opinion of the Circuit Court of Appeals in this cause is set out in the Record, pages 69-72, and is reported in 128 Fed. 2nd, 843. By this written opinion, said Circuit Court of Appeals held the trial court had erroneously determined the jurisdictional question, and in passing upon the merits of this cause of action, erroneously held:

> "The regulatory provisions of the statute are appropriate to the attainment of the legislative object, and are not arbitrary or unreasonable. From its very nature, the practice of beauty culture is essentially an intrastate business as localized in character as any exclusively personal-service enterprise. The fact that a regulatory statute of a state, otherwise valid under rigorous scrutiny, is, in an isolated instance, effective incidentally to burden interstate commerce, does not destroy its constitutionality."

VI.

Reasons Relied Upon for the Allowance of the Writ.

The writ of certiorari as herein prayed, should be granted for the reason that the United States Circuit Court of Appeals for the Fifth Circuit in this cause er-

roneously decided a Federal constitutional question of gravity and importance. The petitioner herein has the right to carry on its interstate business in the State of Florida, free from the arbitrary and unreasonable imposition of the Legislature of that State. The petitioner has the right to a declaratory judgment holding and declaring the Florida Beauty Culture Law to be inapplicable to the business of the petitioner in the State of Florida for the reason that as applied to said business, there the same constitutes an unreasonable and arbitrary, and therefore invalid, attempt upon the part of the State of Florida to exercise the police power of that State. The specific basis of the within petition is that the Circuit Court of Appeals, in deciding the within cause of action upon its merits, erroneously failed to reverse the United States District Court for the Northern District of Florida.

Wherefore, the petitioner herein respectfully prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, to the end that the judgment of said United States Circuit Court of Appeals for the Fifth Circuit may be reviewed and reversed by this Honorable Court.

UNITED ENTERPRISES, INC.,
Petitioner,

By THEODORE LOCKYEAR,

ELMER Q. LOCKYEAR,
Attorneys for the Petitioner.

Dated at Evansville, Indiana,
this 4th day of September, 1942.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

NO.

UNITED ENTERPRISES, INC.,
Petitioner,

vs.

ANNE DUBEY, EVA A. LOWTHER, and LEE ORA BROWN, Being and Comprising the Members of the Florida State Board of Beauty Culture Examiners,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

I.

The Opinion.

The petitioner herein by a petition for a writ of certiorari seeks a review of a judgment and opinion of the

United States Circuit Court of Appeals for the Fifth Circuit, which judgment and opinion is found in the Record, pages 69-72; the same is reported in 128 Fed. 2nd, at page 843. This said judgment and opinion is an affirmance of a judgment and opinion of the United States District Court for the Northern District of Florida in this cause, which opinion is set out in the Record, pages 59-62, and is reported in 42 Fed. Supp. 60.

II.

Statement of the Grounds Upon Which the Jurisdiction of the Supreme Court of the United States Is Invoked.

This statement is set out in the preceding petition under II, pages 12 to 14, which is hereby adopted, and made a part of this brief by reference.

III.

Statement of the Case.

A concise statement of the case containing all that is material to the consideration of the questions presented is set out in the preceding petition under I, pages 1 to 12, which is hereby adopted and made a part of this brief by reference.

IV.

Specification of the Error Intended to Be Urged.

This specification is set out in the preceding petition under III, pages 14 to 15, and is hereby adopted, and made a part of this brief by reference.

V.

ARGUMENT.

Summary of Argument.

1. The Supreme Court of the United States has jurisdiction to pass upon the Federal questions presented by the petition for writ of certiorari herein.

2. The United States Circuit Court of Appeals for the Fifth Circuit erroneously affirmed the judgment and decision of the trial court upon the merits of this cause of action.

(A) The business of the petitioner in the State of Florida is interstate in character and as such, petitioner is entitled to the Federal constitutional protection afforded its business.

(B) The Florida beauty culture law is an invalid, arbitrary and unreasonable attempt to exercise the police power on the part of the State of Florida in that it attempts to place an unreasonable and arbitrary burden upon petitioner's interstate business in the State of Florida, and constitutes a regulation, as applied to petitioner's said business, that has no reasonable or substantial relation to any question of public health.

I.

The Supreme Court of the United States has jurisdiction to pass upon the federal question presented by the petition for writ of certiorari herein.

The United States Supreme Court has jurisdiction to pass upon the within petition by virtue of the provisions of Section 240(a) of the Judicial Code of the United States, 28 U.S.C.A. 347(a). Jurisdiction of this cause in the United States District Court for the Northern District of Florida in the first instance is predicated upon the diversity of citizenship, and the amount or value of the matter in controversy being in excess of three thousand dollars. (Section 24 of the Judicial Code of the United States as amended, 28 U.S.C.A. 41.) The jurisdiction of the trial court over the subject matter of this cause of action has been properly sustained by the United States Circuit Court of Appeals for the Fifth Circuit in their written opinion herein (Rec. 69-72) (128 Fed. 2nd, 843).

II.

The United States Circuit Court of Appeals for the Fifth Circuit erroneously affirmed the judgment and decision of the United States District Court for the Northern District of Florida upon the merits of this cause of action.

A.

The business of the petitioner in the State of Florida is interstate in character. The petitioner is engaged in the manufacture and sale of cosmetics. Its plant and principal place of business is at Evansville, Indiana. They follow a direct sales method and their products are sold only in interstate commerce. This sales method was fol-

lowed in Florida and elsewhere. A representative of the petitioner in a duly licensed beauty shop would give a free demonstration of petitioner's products to an interested prospective purchaser. This was without charge or obligation, and the only profit derived by the petitioner was upon the possible sale of such product to such prospective purchaser. This demonstration consisted of the application of a small portion of cold cream or other cosmetic preparation, or both, to the face of the prospective purchaser. If an order of cosmetics was sold to such person, such order was shipped direct from Evansville, Indiana, by parcel post, C.O.D. to the customer in Florida. This sales method is to all intents and purposes, identical with that employed by the manufacturer in the case of *Realsilk Hosiery Mills* v. *the City of Portland*, 268 U. S. 325, 69 L. Ed. 982, wherein the United States Supreme Court held that such a transaction constituted interstate commerce. This case is decisive of that question.

That part of petitioner's sales practice or technique which consists of the giving of said demonstration of their products is not localized and separate from their sales procedure, but is a part and parcel of the whole transaction. Petitioner's sales people are not practicing beauty culture. They are selling merchandise. They do not hold themselves out as beauticians. They do not practice any of these many varied practices, the whole of which constitutes the practice of beauty culture. In making a sale of cosmetics, and purely as an incident thereto, nothing more whatever, they permit a prospect to sample their product. These demonstrations most certainly formed a part of an interstate transaction, as much as the writing up of the order to be mailed to the home office.

B.

This being purely an interstate transaction, this business of the petitioner was subject to the constitutional protection afforded it by Article 1, Section 8, Clause 3 of the Federal Constitution and the Fourteenth Amendment thereto. The petitioner's right to so transact said business included the right to be free from regulation or imposition by the State of Florida. This broad statement is subject to the right of the State of Florida to the enactment of regulatory statutes under the police power, which in turn is subject to the further limitation that a regulation under the police power must be reasonable, and bear some reasonable and substantial relation to the public health problem involved.

The Florida Beauty Culture Law, as the regulation in question, is unreasonable and as it affects petitioner's business in the State of Florida, it bears no reasonable or substantial relation to the public health problem involved.

The Florida Beauty Culture Law (Rec. 31-57) to be sustained as a proper exercise of the police power must be a reasonable regulation, and such regulation must have a reasonable relation to the public health problem involved.

Baker v. *Daly* (Fed. D. C.) 15 Fed. 2nd, 881;
Board of Cosmetological Examiners of Jefferson County v. *Gibbons* (Ala), 193 So. 116;
Hoff v. *State* (Del.), 197 Atl. 75;
State v. *Knight* (W. Va.), 191 S. E. 845;
Opinions of Attorney General of Indiana, 1937, p. 345;
State v. *Walker* (Wash.), 38 Pac. 2nd, 364;
Ex parte Lucas (Mo.), 61 S. W. 218;
Schneider v. *Duer* (Md.), 184 Atl. 914.

The appellant has a constitutional right to transact its business, interstate in character, in the State of Florida unhampered by unreasonable regulations of the Florida Beauty Culture Act, which have no reasonable relation to the public health problem involved.

The requirements of the Florida Beauty Culture Law that a sales person in the State of Florida be required to devote 20 months of study of unrelated subjects and apprenticeship before being permitted to apply a small sample of appellant's merchandise by way of demonstration to the face of another is an unreasonable and arbitrary requirement that has no relation to the public health.

The State cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupation or impose unreasonable or unnecessary restrictions upon them.

Smith v. *Texas*, 233 U. S. 630;
Burns Baking Company v. *Bryan*, 264 U. S. 504, 513;
Weaver v. *Palmer Brothers Company*, 270 U. S. 402;
Liggett Company v. *Baldridge*, 278 U. S. 105, 113;
Lawton v. *Steele*, 152 U. S. 133, 38 L. Ed. 385;
Baker v. *Daly* (D. C. Oregon), 15 Fed. 2nd, 881;
Marx v. *Maybury* (D. C. Washington), 30 Fed. 2nd, 839.

While it is proper for the Legislature to create classes for the purpose of legislation, such classifications must not be arbitrary or unjust and must not arbitrarily include within the class persons having no reasonable relation to the classification.

Weaver v. *Palmer Brothers Company*, 270 U. S. 402;
Baker v. *Daly* (D. C. Oregon), 15 Fed. 2nd, 881.

What is a reasonable exercise of the police power under any circumstances depends largely upon the nature and character of the undesirable conditions to be overcome or prevented. There must be some logical connection between the object sought to be accomplished by the legislation and the means prescribed to accomplish such purpose. There must be some real or substantial relation between the regulation and the protection of the public. The right of a citizen to engage in a lawful and useful calling is a right that cannot be arbitrarily interfered with.

What is there wrong or invalid about the requirement of the Florida Act that one to practice beauty culture must be registered? Is not there a public health problem involved in the application of cosmetics to the face of another with the human hands? Should not one who so practices on the general public be subjected to a physical examination to show freedom from commutable diseases? Does not this justify this Florida enactment? If the Florida Act went no further than to require a representative of the petitioner to pay a reasonable fee for a permit and as a condition for receiving such a permit, such applicant be required to show by physical examination freedom from contagious diseases, petitioner would not question the validity of the Florida Act. Undoubtedly, the State of Florida could so regulate the business of the petitioner. But that is not the question here presented.

What are the regulations that the State of Florida seeks to impose upon the petitioner's business through licensing requirements? How does one get a license or a certificate of registration in the State of Florida? Under Section 5 of the Act, any person is qualified to receive a certificate of registration to practice beauty culture who has:

Qualified under Section 6 of the Act. Section 6 fixes the requirement for a person to first qualify and receive a certificate of registration as a junior operator. In other words, before you can apply for a certificate of registration you must first become a junior operator. Among other requirements, to receive a certificate as a registered junior operator a person must have been graduated from a school of beauty culture approved by the Board and have passed a satisfactory examination conducted by the Board to determine his or her fitness to practice as a junior operator, which shall cover all the unrelated practices defined in Section 2. Thus, in order to become a mere junior operator, a person must be a graduate of an approved beauty culture school, and be able to pass an examination in the following subjects:

"Cutting or bobbing the hair.

"Facial and scalp massage or treatment with oils, creams, lotions or other preparations.

"Singeing, shampooing, or dyeing the hair or applying hair tonics.

"Applying cosmetic preparations, antiseptics, powders, oil, clay, or lotions to scalp, face, or neck.

"Hairdressing or the arranging, waving, dressing, curling, cleansing, thinning, cutting, singeing, bobbing, bleaching, tinting, coloring, steaming, straightening, dyeing, brushing, beautifying, or otherwise treating by any means the hair of any person.

"Manicuring, or the cutting, polishing, tinting, coloring, cleansing, or manicuring the nails of any person, and massaging.

"Pedicuring or the shaping, polishing, tinting, coloring, cleansing, or pedicuring the nails of the feet of any person, and massaging or beautifying the feet of any person.

"Permanent waving or the preparing, arranging, curling, cleansing, and treatment of the hair for curl-

ing, by the use of permanent waving machines, mechanical appliances, or chemical heat devices or heat materials, or chemical means."

Section 7 of the Act provides that no school of beauty culture shall be approved except those that require as a prerequisite to graduation a course of instruction and practice of not less than 1000 hours of continuous study and practice, of not more than 8 hours in any one day, within a period of 12 months, and such course of instruction to include the following subjects:

"Scientific fundamentals for beauty culture, physiology, hygiene, elementary chemistry relating to sterilization and antiseptics, massaging and manipulating the muscles of the face, neck and scalp, hair cutting, bobbing, hair trimming, and dyeing the hair, shop management and business methods, facial and scalp massages, or treatment with oils, creams, lotions or other preparations, shampooing, singeing, or applying hair tonics, applying cosmetic preparations, antiseptics, powders, oils, clay or lotions to scalp, face or neck.

"Hairdressing or the arranging, waving, dressing, curling, cleansing, thinning, cutting, singeing, bobbing, bleaching, tinting, coloring, straightening, dyeing, brushing, beautifying or otherwise treating by any means the hair of any person.

"Manicuring or the cutting, trimming, polishing, tinting, coloring, cleansing, or manicuring the nails of any person, and massaging, cleansing, treating or beautifying the hands or feet of any person.

"Pedicuring, or the shaping, polishing, tinting, coloring, cleansing the nails of the feet of any person.

"Permanent waving, or the preparing, arranging, curling, cleansing, and treatment of the hair for curling, by the use of permanent waving machines, mechanical appliances or chemical heat devices or heat materials, or other chemical means.

"Removing superfluous hair from the body of any person by the use of electrolysis, or by the use of depilatories, by the use of tweezers, chemical preparation, or by the use of devices or appliances of any kind or description, except by the use of light waves commonly known as rays."

Thus a junior operator must spend 6 months in school, devoting 1000 hours to the study of some 70 or more unrelated subjects, having no relation to any health problem incident to giving a demonstration of cosmetics to a prospective purchaser. Completing this course of study does not yet qualify one.

In addition to having qualified as a junior operator, such applicant for a certificate of registration must under Section 5C show evidence of having practiced as a registered junior operator for a period of 12 months under the immediate supervision of a registered beautician, and in a shop wherein a majority of the practices of beauty culture are engaged in.

Therefore, in order to become a licensed and registered beautician in the State of Florida, a representative of the petitioner in order to apply a portion of the contents of one jar of cold cream to the face of a prospective purchaser, must have followed and pursued a course of study in an approved beauty school for a period of not less than 6 months, for at least 1000 hours, and have practiced as a junior operator for a period of not less than 12 months. 18 months in all devoted to study and apprenticeship, of a variety and conglomeration of subjects having no relation whatsoever to the public health problem involved in the demonstration of cosmetics to a prospective purchaser by the application of a portion thereof to the face of such

prospective purchaser. Can it be denied that these regulations are unreasonable? Is it reasonable to require a sales person of the petitioner to spend months of study in such unrelated subjects as hair straightening, bleaching of the hair, manicuring, removing superfluous hair by electrolysis, when at no time does the representative of the petitioner attempt to do any of those things, or intend to do so? That is not their business. They are only interested in selling cosmetics.

An examination of these three sections of the Florida Act to which we have referred, namely, Sections 2, 5, 6 and 7 of the Act, will reveal that a person, in order to become a registered beautician in the State of Florida, must be able to show study, education, proficiency and apprenticeship in a variety of numerous unrelated subjects. This will require that such applicant spend the full 18 months preparing herself for types of work which she does not intend or hold herself out as ready and able to perform. Certainly, these regulations are unreasonable.

How could a representative of the petitioner secure a license or a certificate of registration in the State of Florida merely by furnishing a health certificate? We admit that if this one regulation constituted the only regulation of the State of Florida, the petitioner would be bound to comply with it, and would be in full accord with such a provision. But this does not answer the criticism which petitioner has leveled against the other regulations, which bear no relation to the public health, safety or general welfare of the citizens of Florida.

It is interesting to note that under Section 4 of the Act, manicuring is exempted from the licensing provisions sought to be imposed against the sales persons of the peti-

tioner. Apparently, the Florida Legislature recognized that it was unreasonable to impose upon manicurists the requirement that they submit to all these unreasonable regulations. By the same reasoning, why should sales persons who demonstrate cosmetics be subjected to all these unreasonable requirements? Why should they be subjected to greater regulation than a manicurist? If it is unfair to require a person who performs no other service than manicuring to become adept in other branches of the beauty trade, it appears to us that it is likewise unfair to impose these restrictions upon the petitioner.

In this brief, we have supported the position urged by the petitioner in this cause by the citation of a number of authorities. We believe these authorities are sound, and clearly state the law in favor of the petitioner on the merits of this controversy. First and foremost of these cases is a case from the Federal District Court of Oregon, the case of *Baker* v. *Daly*, 15 Federal 2nd, 881.

This case is in point. Quoting from the opinion of the Court in this case:

> "* * * Cosmetic therapy is declared by the act to be 'the application of the hands or of mechanical or electrical apparatus, with or without cosmetic preparations, tonics, lotions, creams or clays, to massage, cleanse, stimulate, manipulate, exercise, or otherwise improve or beautify the scalp, face, neck, shoulders, arms or upper part of the body, removing superfluous hair, manicuring the nails of any person, male or female, and to arrange, dress, curl, wave, cleanse, cut, single, bleach, color or similarly treat the hair of any female'.
>
> "The plaintiffs are expert in waving the hair of females and earn their living thereby. They are not proficient in any of the other kinds of work named in

the act, and are not able to qualify therein, nor do they desire or intend to do any such work. They contend that as to them the law is arbitrary, unreasonable, oppressive, and deprives them of the protection afforded by the 'Fourteenth Amendment to the Constitution of the United States, which declares that no state shall deprive any person of life, liberty, or property without due process of law.'

"This constitutional provision has been declared by the Supreme Court to mean, 'not only the right of the citizen to be free from mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation.' The right thus granted is, of course, subject to the police power of the state to enact laws essential to the public safety, health, or morals; but, to justify a state in exercising such authority, it must appear that the interest of the public requires such interposition, and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive to individuals. 'The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose undue and unnecessary restrictions upon lawful occupations.'

"In our opinion the legislation in question violates that rule. It arbitrarily groups together different and unrelated callings or professions, and forbids citizens from following one of them without qualifying, under the enactment, in all the others. It includes in the definition of cosmetic therapy (1) massage; (2) removing superfluous hairs; (3) manicuring; and (4) arranging, dressing, curling, etc. the hair of any female—and provides that no person shall follow any one of these occupations without being qualified in all the others. Thus one may be an expert in one of the callings spe-

cified, and prohibited and forbidden from following it and earning his living thereby, unless, in the judgment of the board of examiners, he is qualified to practice all the others. This, in our opinion, is an arbitrary and unreasonable exercise of legislative authority, and deprives the plaintiffs of the right, guaranteed them by the Constitution, to work and earn their living by a lawful occupation.

"It follows, therefore, that the motion to dismiss should be overruled, and injunction issued."

This case is without question decisive of the question of this appeal.

Petitioner also relies on the case of *Hoff* v. *State*, (Del.), 197 Atl. 75, from which the following is quoted:

"The police power is far reaching and elastic. It embraces everything essential to the public health, safety and morals. It is the source from which the Legislature derives its authority to regulate and control professions, trades, occupations and businesses. It is not, however, without limits, and a limitation of the power is the due process clause of the Fourteenth Amendment to the Federal Constitution, which requires that the regulation be reasonable, and that the means of regulation shall have a real and substantial relation to the object to be obtained. * * *

"To justify the State in interposing its authority in behalf of the public, it must appear that the interests of the public, as distinguished from those of a particular class, demand such interference; that the means employed are reasonably necessary for the accomplishment of the purpose; and that they are not unduly oppressive on individuals. The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; nor is the determination by the Legislature as to what is a proper exercise of its police

power final and conclusive, but is subject to supervision by the courts. * * *

"Courts should be careful to sustain the proper exercise of the police power for the protection of the public health and safety, and, in so doing will not hesitate to overthrow or limit private rights in conflict therewith. On the other hand, Courts will freely interpose by judicial veto, when a lawful occupation is unreasonably and arbitrarily interfered with or restricted under the guise of protecting the public welfare."

The petitioner also relies on the Maryland case of *Schneider* v. *Duer,* 184 Atl. 914, from which the following is quoted from the opinion of the Court:

"Under this act persons desiring to engage in that occupation are met with requirements entirely out of proportion with the character and purposes of this trade and with the safeguards that seem just and fair to the public. They constitute an arbitrary prohibition rather than a reasonable approach to a lawful and chosen work. These restrictive measures strike at the foundation of the trade, in that they wrongfully and illegally interfere with those who wish to engage in it, and, if strictly enforced, few would be able to accept this calling and engage in its activities. This constitutes an unreasonable and illegal exercise of police power. * * *

"In order to obtain a license to practice this simple trade, one must have had 10 years of educational preparation. He must have been a graduate of the eighth grade and have completed a 2 year course in a barber school or a barber shop. If working in a shop, his services must continue for at least 8 hours a day. These are manifestly unreasonable requirements to enter a simple occupation.

"But, in addition to these educational prerequisites, we find the following provision in the act requiring that the course of instruction shall include the following subjects: 'Scientific fundamentals for barbering,

hygiene, bacteriology, histology of the hair, skin, nails, muscles and nerves, structure of the head, face and neck, elementary chemistry relating to sterilization and antiseptics, disease of the skin, hair, glands and nails, haircutting, shaving and arranging, dressing, coloring, bleaching, and tinting of the hair' * * * Such requirements are obviously far beyond the need of this trade; in fact, even a fundamental knowledge of all these studies and sciences is beyond the reach of persons except those with advanced education. * * *

"It is unreasonable that such standards should be set for this occupation. There is an apparent design, although indefensible and unreasonable, to give to this simple and useful trade the characteristics and standards of a highly technical profession, surrounded with requirements, grades, and divisions such as one might expect to find in those professions where life, liberty and property are of every day concernment. There is no parallel to be drawn between such callings, and an effort to constitute an artificial equality by police regulations cannot be accepted as a constitutional exercise of legislative power. * * *"

Another Washington case sustaining this proposition is the case of *State* v. *Walker*, 38 Pac. 2nd. 364. Here it was held that it is competent for the legislature, by virtue of the police power to prohibit persons from practicing the calling of a barber without first having obtained a license or certificate of registration, the health of citizens, as affected by the diseases spread from barber shops conducted by unclean and incompetent barbers, justifying the exercise of such power. But the provisions of the Washington statute for the regulation of barbers have been held to be valid only in so far as they promote the public health and safety. In this case, it was held that if a statute authorized a board of examiners to reject an application for a barber's license on the ground that the applicant lacked

proficiency in matters not affecting the public health or safety, it was to that extent, a deprivation of liberty without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution.

Both the District Court and the Circuit Court of Appeals in this cause were led into error by the evident high purposes precipitating the passage of the statute in question. Undoubtedly many features of the beauty shop business create definite health problems and surely it was within the power of the State of Florida to correct same. But this does not mean that the State of Florida, to correct health problems in the beauty shops of Florida, can impose upon petitioner's business such a set of arbitrary regulations as are revealed in this cause of action. The imposition of these regulations upon petitioner's business has not the remotest relation to these health problems, and the same do not constitute measures even designed to correct these health problems. These regulations as applied to the trade of beauty culture in general, may or may not be reasonable, but as applied to petitioner's business, they are arbitrary, unjust and definitely burdensome.

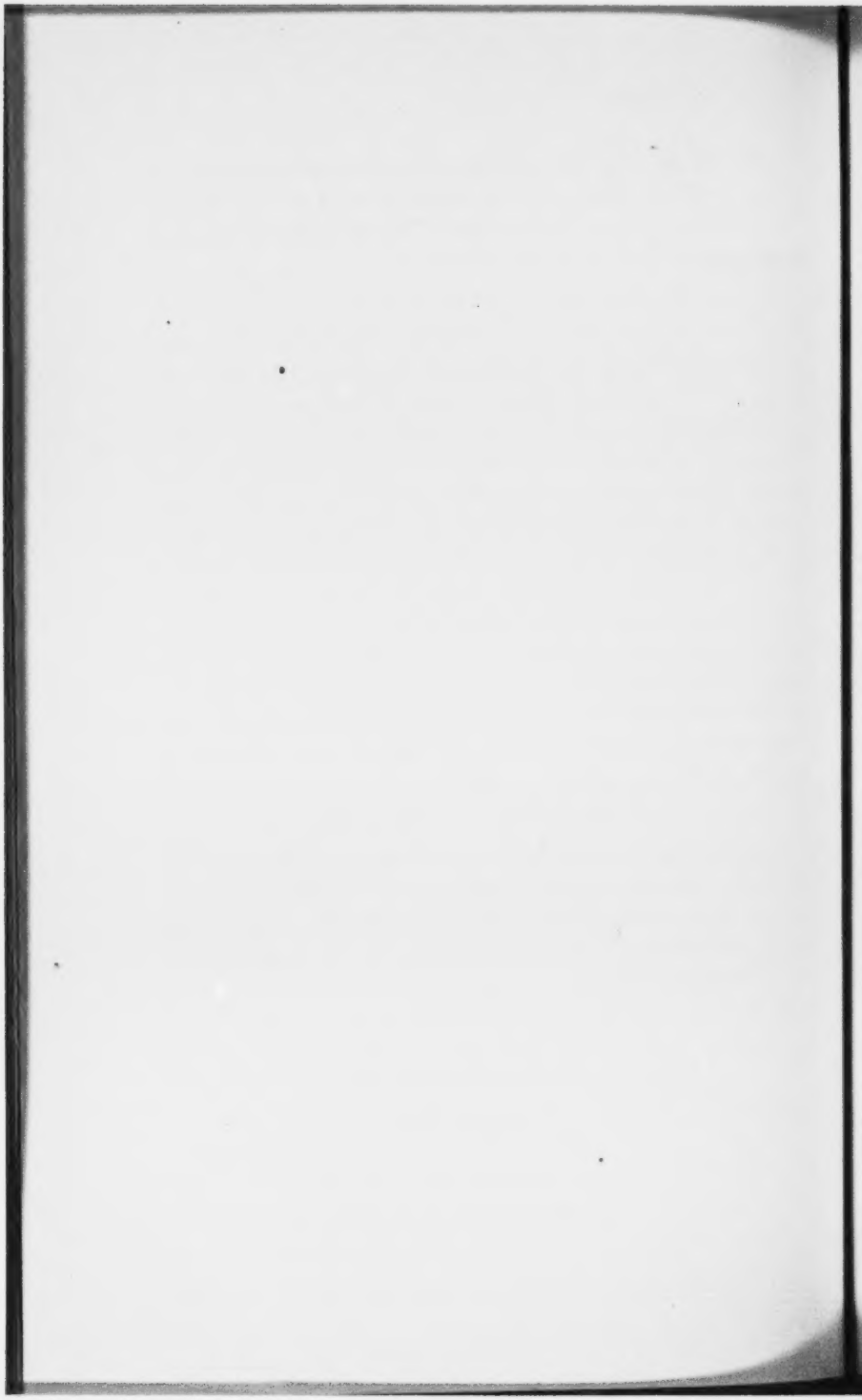
The petitioner respectfully urges that upon the basis of the authorities herein cited, and upon the undisputed facts of this cause of action, the writ of certiorari herein prayed for should be granted, to the end that the Supreme Court of the United States may reverse the Circuit Court of Appeals for the Fifth Circuit in this cause.

Respectfully submitted,

UNITED ENTERPRISES, INC.,
Petitioner.

By THEODORE LOCKYEAR,
ELMER Q. LOCKYEAR,
Attorneys for Petitioner.

Dated at Evansville, Indiana, this 4th day of September, 1942.



SEP 29 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 374

UNITED ENTERPRISES, INC.,
Petitioner,

vs.

ANNE DUBEY, EVA A. LOWTHER, and LEE ORA BROWN, Being and Comprising the Members of the Florida State Board of Beauty Culture Examiners,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

Summary

The petitioner instituted suit in the District Court of the United States for the Northern District of Florida, seeking a declaratory judgment against the respondents. The cause was presented to the District Court upon petitioner's

amended complaint (tr. 4), respondents' answer thereto (tr. 18), and a written agreed statement of facts composed by the parties (tr. 25). The District Court denied petitioner's application for a declaratory judgment and dismissed the complaint (tr. 58).

The petitioner took an appeal to the Circuit Court of Appeals, Fifth Circuit, and the appellate court affirmed the decision of the lower court (tr. 72), and petitioner filed a petition in the Supreme Court of the United States for writ of certiorari to the Circuit Court of Appeals.

Petitioner's Amended Complaint

The amended complaint (tr. 4) alleges that petitioner's sales practice is substantially this:

A prospective purchaser is approached by petitioner's sales representative in the purchaser's home or in a beauty shop and the merits and advantages of petitioner's products are explained. When desired by the customer, a demonstration is given her by the sales representative, without charge, in this fashion: A small portion of cold cream or facial cream is applied to the prospect's face, without massage, and this is promptly removed. A liquid skin softener is then applied and then removed. A powder base is then applied, then powder, rouge and lipstick are applied. The demonstration is without obligation on the customer's part, and petitioner's only profit is from the sale when made. The customer may or may not purchase. In giving the demonstration, no equipment is used except an ordinary straight chair and mirror (Paragraph III, Amended Complaint).

When a purchase is made, the sales representative fills out and signs, in duplicate, an order blank. This obligates

petitioner to deliver the merchandise to the purchaser by mail, C. O. D., direct from its plant in Evansville, Indiana. A deposit is paid to the sales representative, which constitutes a part of the purchase price, and is retained by the representative as her commission in full. The balance of the sales price is collected by postal authorities upon delivery of the C. O. D. parcel (Paragraph II, Amended Complaint).

It is also alleged that petitioner's sales representatives, in giving these demonstrations do not advertise or hold themselves out as being beauty culturists, cosmeticians or cosmetologists, or as giving any sort of beauty treatments or services (Paragraph IV, Amended Complaint).

It is averred that because of arrests and threats of prosecutions by the board, petitioner was forced to abandon its demonstrations; that previously petitioner's profits from its sales in Florida were more than $400 per month, and that, except for such interference by the board, it would have continued to do business in like volume thereafter. It is claimed that it is now impossible for petitioner to continue its business in Florida, unless relieved of the burden of the state statute, and that, therefore, more than $3,000 is involved (Paragraph VIII, Amended Complaint).

It is charged that the state statute is inapplicable to such activities since petitioner's demonstrators are not actually engaged in the practice of beauty culture, and, further, that the act places an unreasonable burden upon petitioner's interstate business (Paragraph VI, Amended Complaint).

Respondents' Answer

Respondents, by their answer (tr. 18), interpose four separate defenses to the amended complaint.

The first defense denies that the amount in controversy exceeds $3,000.

The second defense asserts that petitioner's "demonstrations" actually constitute the practice of beauty culture and, hence, are subject to the requirements of the Florida law; that the "demonstrations" are purely "local" transactions, and subject to regulation under the state's police power.

The third and fourth defenses assert that the district court is deprived of jurisdiction by the excepting provisos of 28 U. S. C. A. 41 (Subd. 1) as now amended.

Agreed Statement of Facts

In settlement of the issues presented by the pleadings, the parties have composed an agreed statement of facts (tr. 25). There, it is agreed that the allegations of the amended complaint concerning the amount and extent of petitioner's business in Florida, past and future, are true. It is obvious that this statement is designed to present the question of the court's jurisdiction over the amount in controversy.

Concerning the merits, the agreed statement of facts definitely fixes the nature and character of the "demonstrations" conducted by petitioner's sales representatives. There, it is agreed that the court is to determine the controversy between the parties upon the assumption that this is the method actually employed by petitioner's representatives:

"Plaintiff's sales representatives engaged a number of women to work as 'demonstrators' in various beauty shops in Florida where plaintiff desired to establish trade outlets for its said cosmetic products. These 'demonstrators' were first given a two weeks' course of training by the sales representatives in the application and use of plaintiff's merchandise upon prospective customers. They were then furnished with a 'kit' containing the creams and preparations necessary to the giving of the demonstrations hereafter described. The 'kit' also contained a spatula for removing the creams from the jars in which they were packed when giving the demonstrations and an eyebrow brush for applying 'make up' to the eyes of the customer, if requested. The 'demonstrator' was required to further equip herself with small cloths or towels to be used as headbands. These were arranged upon the customer to protect her hair from the preparations used in the demonstration.

"The sales representative and one of the 'demonstrators' then entered a beauty shop with this proposal to the shop owner or operator: The 'demonstrator' would remain in the shop for a short time, giving demonstrations of plaintiff's merchandise to prospective customers and promoting its sale. These would be drawn from women casually entering the shop or brought there by special appointment. In order to induce the prospect to buy, the 'demonstrator' would propose that she give to the prospect a demonstration in the use of the merchandise. The materials in the 'kit' were used. The prospect would be taken into one of the regular booths maintained in the shop for giving beauty treatments. She would

be placed in a reclining position in a regular reclining chair or couch, commonly known as a 'facial couch'. Towels (furnished by the shop) would be adjusted about the shoulders and body of the prospect. One of the 'demonstrators' headbands would be put in place. The demonstration then proceeded in this manner:

"(1) Plaintiff's merchandise, known as a cleansing cream, would be applied over the entire face with spreading and stroking movements, then all of it would be removed with tissue.

"(2) Another of plaintiff's preparations, known as a special throat cream and eye cream, would be placed over the throat and eyes.

"(3) The remaining portion of the face would be covered with another of plaintiff's preparations known as 'skin food'.

"(4) The face was then gently manipulated with the fingers.

"(5) Over this would be placed another of plaintiff's preparations consisting of a white cream or 'clay' and known as a 'beauty pack'. This was allowed to dry for eight or ten minutes.

"(6) It was then thoroughly removed with cloths soaked in warm water.

"(7) An astringent lotion or cream was then smoothed over the face.

"(8) The 'demonstrator' then applied 'make up' consisting of face powder, rouge on the cheeks and lipstick on the lips. If the customer desired, 'make up' was placed about the eyes.

"This entire process was conducted by the 'demonstrator' and the materials used were those manufactured by the plaintiff. It consumed from forty to forty-five minutes. It is what is known in the beauty trade as a 'facial' and is given for the purpose of beautification."

Judgment and Opinion of District Court

Upon this state of the record the District Court denied petitioner's application for declaratory judgment and dismissed the complaint, (tr. 58) and rendered an opinion (tr. 59) (*United Enterprises, Inc.*, v. *Dubey, et al.*, 42 *Fed. Supp.* 60), saying:

" • • • The paramount questions to be determined are two: first, has the court jurisdiction, and second, whether the police regulation sought to be enforced upon the plantiff is reasonable."

• • •

"As to the reasonableness of the police regulation prohibiting the giving of facials, there is abundant authority to the effect that the power of the Federal Government to regulate interstate commerce does not disable the states from adopting reasonable measures designed to secure the health and comfort of their people. Every state police statute in some manner will necessarily affect interstate commerce in some degree, but such a statute does not run counter to the grant of congressional power merely because it incidentally or indirectly involves or burdens interstate commerce.

"No showing has been made that plaintiff does not have a speedy and efficient remedy at law or in

equity in the courts of this state, or that the Florida act unreasonably interferes with plaintiff's rights to transact its business in interstate commerce.

"It is, therefore, the opinion of the court that it is without jurisdiction, but, were the opinion to the contrary the court holds that the Florida act under consideration is a proper exercise of the state's police power and that the regulation is reasonable.

"An order will be entered denying the motion for declaratory judgment and dismissing the complaint at the cost of the plantiff."

Judgment and Opinion of Circuit Court of Appeals

Upon an appeal taken by the petitioner to the Circuit Court of Appeals, the appellate court affirmed the decision of the lower court (tr. 72), and rendered an opinion (tr. 69), *United Enterprises, Inc.* vs. *Dubey, et al.*, 128 *Fed.* (2d) 843, and although the appellate court disagreed with the lower court as to the question of jurisdiction, it affirmed the case on its merits, saying:

" * * * The states of the union have never relinquished their sovereign power so to protect their citizens by appropriate legislation; they are only obligated to exercise their authority without encroachment upon powers delegated to the federal government and rights arising thereunder; and so long as a state statute, designed to promote and protect the public health, has a real and substantial relation to that purpose, is reasonable, and operates without discrimination between subjects of the same class, it is not violative of the Fourteenth Amendment.

"The Legislature of Florida plainly intended by this statute to prevent the spread of contagious diseases, to induce (fol. 73) cleanliness and sanitation, and to insure the adoption of healthful standards throughout the beauty culture industry, in the interests of the public welfare. The regulatory provisions of the statute are appropriate to the attainment of the legislative object, and are not arbitrary or unreasonable. From its very nature, the practice of beauty culture is essentially an intrastate business as localized in character as any exclusively personal-service enterprise. The fact that a regulatory statute of a state, otherwise valid under rigorous scrutiny, is, in an isolated instance, effective incidentally to burden interstate commerce, does not destroy its constitutionality."

The Petition For Writ of Certiorari

The petition for writ of certiorari in effect sets forth the trial proceedings in the District Court and the appellate proceedings in the Circuit Court of Appeals, and alleges that the Circuit Court of Appeals erroneously decided a federal question and that the Supreme Court has jurisdiction to review this case on writ of certiorari.

STATEMENT OF QUESTIONS INVOLVED

I.

DOES THE PETITION FOR A WRIT OF CERTIORARI PRESENT A FEDERAL QUESTION THAT WILL INVOKE THE JURISDICTION OF THIS COURT TO REVIEW THIS CASE ON WRIT OF CERTIORARI?

II.

DID THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRONEOUSLY AFFIRM THE JUDGMENT AND DECISION OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA ON THE MERITS OF THIS CAUSE OF ACTION?

ARGUMENT

I.

DOES THE PETITION FOR A WRIT OF CERTIORARI PRESENT A FEDERAL QUESTION THAT WILL INVOKE THE JURISDICTION OF THIS COURT TO REVIEW THIS CASE ON WRIT OF CERTIORARI?

Upon the question of jurisdiction, the petitioner relies upon the provisions of Section 240(a) of the Judicial Code of the United States and 28 U. S. C. A. 347 (a). The question of jurisdiction now involved, as the respondents understand it, is not merely the question of whether or not a district court had jurisdiction to try this case below, but whether or not the Supreme Court has jurisdiction to issue a writ of certiorari herein to the circuit court of appeals. In this respect, the respondents contend that the federal question presented by the petition for writ of certiorari is not a federal question such as would entitle the petitioner to a writ of certiorari; that Section 240 (a) of the Judicial Code of the United States should be read in connection with Rule 38, part 5, of the U. S. Supreme Court Rules. This rule provides that review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor, and, while neither controlling nor fully measuring the court's discretion, indicates and sets forth the character of reasons which will be considered. The petition fails to set forth a federal question which would come under any of the provisions of this rule.

There is a recognized distinction between writ of certiorari and appeal, and writ of certiorari was never intended to take the place of, and serve the same purpose as, an appeal. For the reasons set forth above, the petition for a writ of certiorari should be denied on jurisdictional grounds.

II.

DID THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRONEOUSLY AFFIRM THE JUDGMENT AND DECISION OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA ON THE MERITS OF THIS CAUSE OF ACTION?

Are Petitioner's "Demonstrations" Within the Purview of the Florida Statute?

In support of its argument that the activities of petitioner's agents constituted a part of an interstate transaction, and, hence, not subject to state regulations, petitioner cites the following authorities:

Board of Cosmetological Examiners, etc., v. *Gibbons*, (Ala.) 193 So. 116.

Baker v. *Daly*, 15 F. 2d 881.

State v. *Knight*, (W. Va.) 191 S. E. 845.

Opinions of Attorney General of Indiana, 1937, page 345.

Hoff v. *State*, (Del.) 197 Atl. 75.

State v. *Walker*, (Wash.) 92 Pac. 775.

Ex Parte Lucas, 160 Mo. 218, 61 S. W. 218.

Schneider v. *Duer,* (Md.) 184 Atl. 914.
Real Silk Hosiery Mills v. *City of Portland,* 268 U. S. 325, 69 L. Ed. 892.
Marx v. *Maybury,* 30 F. 2d 839.
Lawton v. *Steele,* 152 U. S. 133, 38 L. Ed. 385.
Smith v. *Texas,* 233 U. S. 630, 58 L. Ed. 1129.
Burns Baking Co. v. *Bryan,* 264 U. S. 504, 68 L. Ed. 813.
Weaver v. *Palmer Bros. Co.,* 270 U. S. 402, 70 L. Ed. 654.
Liggett v. *Baldridge,* 278 U. S. 105, 73 L. Ed. 104.

Only three of these (*Board of Cosmetological Examiners, etc.,* v. *Gibbons; State* v. *Knight;* and Opinion of Attorney General of Indiana) deal with issues growing out of "demonstrations". The other cases cited by petitioner concern questions entirely irrelevant to those presented in the case at bar, as brief reference thereto will demonstrate:

Baker v. *Daly,* 15 F. 2d 881, merely deals with an attack upon an act of the Oregon legislature known as the Cosmetic Therapy Law by persons who were "expert in waving the hair of females and earn their living thereby." It was contended that the law was arbitrary and unreasonable in that it grouped together different and unrelated callings or professions, and forbid citizens from following one of them without qualifying in all the others. On this ground the law was held invalid. No question of the right to give "demonstrations" was involved, nor are any of the objectional features of that act urged as permeating the provisions of the Florida statute. The case is not in point.

In *Hoff* v. *State,* (Del.) 197 Atl. 75. the validity of a Delaware statute regulating the practice of beauty culture

was before the court in a criminal case in which defendant was charged with engaging in business without a certificate of registration as required by the act. The court recognized the power of the legislature to regulate such a business upon principles of public health and safety. But, it held that the act in question exceeded that limitation. It was said that the implied power conferred upon the board of examiners to fix a standard by which beauty schools were identified was an unlawful delegation of legislative authority. It was further held that educational requirements and those of age and apprenticeship had no relation whatever to the public health and safety and, therefore, were beyond legislative fiat. For these reasons the act was held invalid. The court specifically renounced *People* v. *Logan,* 284 Ill. 83, 119 N. E. 913, relied upon as upholding the act. The Supreme Court of Florida, on the other hand, has adopted that decision as controlling.

State v. *Reeve,* 104 Fla. 196, 139 So. 817 (820).

In the latter case, the Supreme Court of Florida upheld a municipal ordinance of the city of Miami, regulating the practice of beauty culture.

If petitioner was urging the invalidity of the Florida statute the case of *Hoff* v. *State, supra,* might be relevant, but such is not the case.

In *State* v. *Walker,* 48 Wash. 8, 92 Pac. 775, 15 *Ann. Cas.* 257 (also cited in *State* v. *Reeve,* 104 Fla. 196, 139 So. 817, 820), it was simply held that a state statute regulating the barber trade was valid in so far as it related to the public health and safety. Regulations not designed to promote the public health and safety were declared to be beyond the state's police power. There is nothing in this case pertinent to the issues in the case now before the court.

A similar case is *Ex parte Lucas,* 160 Mo. 218, 61 S. W. 218. It was there merely held that the barber trade was a proper subject of legislative control, under the state police power.

In *Schneider* v. *Duer,* (Md.) 184, Atl. 914, the validity of an act regulating the barber trade was in question. The court said:

> "The occupation of barbering is a trade that may be subjected to police regulations, so far as the health and safety of the public is concerned."

In holding that the act in question, in its maze of regulations and requirements, exceeded this purpose and was, hence, invalid, the court again said:

> "Such an aggregation of regulations and requirements wrongfully interfere with or prohibit persons from engaging in this long established occupation. Many of them bear no relation whatsoever to the health future."

Provisions declared to be unreasonable related to restrictions upon places in which barbers might practice, revocation of licenses upon conviction for crime, revocation of licenses upon communication of contagious disease to another (the court pointed out that under this provision a barber might have his license revoked by unintentionally infecting another with a bad cold) and requirements for obtaining licenses unrelated to public health and safety. Neither is this decision pertinent except in case of an attack upon the validity of the Florida statute.

In *Marx* v. *Maybury,* 30 F. 2d 839 (District Court, State of Washington), it was held that a state statute regulating the occupation of barbers was invalid only in so far as

its provisions were concerned which stipulated that not more than one student apprentice shall be employed in any barber shop and requiring barber colleges to give courses of instruction, to be completed within six months, covering scientific fundamentals for barbering, etc. The case has no application to the one at bar.

Some of these decisions might be relevant if this was a case where petitioner was contending that it should be relieved of certain specified requirements of the act, claimed to be invalid. But, such is not the case. Petitioner does not offer to comply with provisions admitted to be reasonable. It says that its activities are entirely beyond the reach of any of the requirements. For instance, the act requires a beauty culturist to furnish a health certificate—a requirement admitted to be proper by all of the authorities. Yet, petitioner's representatives decline to comply with this provision. So, the cases dealing merely with specific provisions of legislation of this character are not in point.

Neither are the decisions from other jurisdictions, concerning the validity of such legislation, pertinent in the face of decisions of the Supreme Court of Florida, holding that the Florida statute now under consideration is a valid and proper exercise of the state's police power.

Gillett v. *Florida University of Dermatology,* (Fla.) 197 So. 852.

Gillett v. *Colson,* (Fla.) 198 So. 109.

In the former case, the Supreme Court of Florida said:

> "The legislature has the power to regulate trades or professions operating directly on the person, upon the theory that their operation affects the health,

comfort, safety and public welfare of the public, and especially is this true as to the occupation of a barber or beauty culturist."

Real Silk Hosiery Mills v. *Portland*, 268 U. S. 325, 69 L. Ed. 982, deals with a subject entirely unrelated to the right of petitioner's sales representatives to give "demonstrations" upon customers in Florida.

In that case a statute of the State of Oregon, requiring persons going from place to place soliciting orders for goods for future delivery, and receiving payment or any deposit in advance, to secure a license and give bond conditioned for final delivery of the goods ordered, was held invalid as unreasonably burdening interstate commerce.

Lawton v. *Steele*, 152 U. S. 133, 38 L. Ed. 385, has not the slightest application to the case at bar. In that case a statute of the State of New York protecing certain game fish within the state's jurisdiction and providing for the destruction of nets and other devices for their taking, was attacked as being an unconstitutional exercise of the state's police power. The Supreme Court of the United States held that the act was valid, saying that state law fixing the manner in which fishing in its waters shall be carried on is proper.

In *Smith v. Texas*, 233 U. S. 630, 58 L. Ed. 1129, a statute of the State of Texas making it a misdemeanor for any person to act as a conductor on a railway train without having previously served for two years as a freight conductor was held invalid as an infringement of the liberty of contract.

It is obvious that neither of these cases bears any relation to the public health.

In *Burns Baking Company* v. *Bryan*, 264 U. S. 504, 68 L. Ed. 813, the constitutionality of a statute of the State of Nebraska, fixing not only a minimum weight of loaves of bread but also their maximum weight, was in question. The statute was declared to impose *unreasonable* burdens upon interstate commerce in this respect:

> "For the reasons stated, we conclude that the provision that the average weights shall not exceed the maximums fixed is not necessary for the protection of purchasers against imposition and fraud by short weights, and is not calculated to effectuate that purpose, and that it subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary, and is, therefore, repugnant to the 14th Amendment."

Hence, the statute was declared invalid.

In *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 70 L. Ed. 654, a statute of the State of Pennsylvania prohibiting the use of "shoddy" in the manufacture of bedding was declared invalid. "Shoddy" is shown to be a material made from clippings and pieces of cloth, as well as second-hand garments, rags and the like. The court says:

> "Here, it is established that sterilization eliminates the dangers, if any, from the use of shoddy. As against that fact, the provision in question cannot be sustained as a measure to protect health. And the fact that the act permits the use of numerous materials, prescribing sterilization if they are second-hand, also serves to show that the prohibition of the use of shoddy, new or old, even when sterilized, is unreasonable and arbitrary."

Liggett v. *Baldridge,* 278 U. S. 105, 73 L. Ed. 104, involved the constitutionality of another Pennsylvania statute providing that a drugstore might not be owned except by a licensed pharmacist and, in the case of corporations, all of its members must be licensed pharmacists. The statute was held invalid, the court pointing out that it "deals in terms only with *ownership*". The court says this:

> "The claim, that mere ownership of a drugstore by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the 14th Amendment."

Neither do these cases seem pertinent to the issues now before the court.

Other authorities cited by petitioner and which appear to be more relevant since dealing with questions growing out of "demonstrations" will be discussed. They are:

Board v. *Gibbons,* (Ala.) 193 So. 116.
State v. *Knight,* (W. Va.) 191 S. E. 845, and
Opinions of the Attorney General of Indiana, 1937, page 345.

The facts in *Board* v. *Gibbons, supra,* are like those alleged in the amended complaint, but unlike those shown by the agreed statement of facts. A comparison of the allegations of the amended complaint and the statement of the court in that opinion, with the agreed statement of facts in the present case, will demonstrate immediately that the pleader, in drafting the amended complaint, was

more concerned with bringing its case within that decision (by alleging an identical state of facts as there shown) than with presenting to the court in the case at bar the state of facts as they actually existed and as now disclosed by the statement of facts.

The allegations in petitioner's amended complaint are:

> "That the sales practice pursued by the plaintiff through their representatives in the State of Florida is as follows: That the representative of the plaintiff approaches a prospective purchaser in the prospective purchaser's home or in a beauty shop wherein the relative merits and advantages of plaintiff's products are explained to the prospective purchaser by the representative of the plaintiff. When desired by the prospective purchaser, a demonstration of plaintiff's merchandise is given to the prospective purchaser of certain of the products which plaintiff sells, which said demonstration is given without any remuneration being received for it by the plaintiff or its representatives or anyone else, and it consists of the following things, and none other: A small portion of cold cream or facial cream is applied to the prospective purchaser's face, without massage, and this is promptly removed. A liquid skin softener is then applied and then removed. A powder base is then applied, then powder, rouge and lipstick are applied. The demonstration is without obligation on the customer's part whatsoever, and the only profit that plaintiff or its representatives make out of said demonstration is in the actual sale of any merchandise that the prospective purchaser may desire. After thus being shown the merchandise, a customer may or may not make a purchase. In giving this free demonstration of said

merchandise, no equipment is used except an ordinary straight chair and mirror."

The method employed by the "demonstrator" in *Board v. Gibbons, supra,* as disclosed by the court's opinion, was:

> "A cold cream is applied to the customer's face without massaging and this is promptly removed. A liquid skin stimulator is then applied to the customer's face with a small soft brush and allowed to remain on the skin some two or three minutes and is then removed with cold water. A powder base is then applied, then powder, rouge, eyeshadow on the eyelids, hand lotion, mascara on the eyelashes and lipstick on the lips. * * * The demonstration is without obligation on the customer's part whatsoever, and the only profit made by your petitioner or petitioner's employees is in the actual sale of any merchandise that the customer may desire. After thus being shown the merchandise the customer may or may not make a purchase. In giving this free demonstration of said merchandise no equipment is used except an ordinary straight chair and a mirror."

A comparison of this statement, with the allegations of petitioner's amended complaint, will leave no doubt but that the pleader resorted to the Alabama decision for its allegations of fact rather than to the circumstances of its own case. But, the facts in this case are not the same at all. In the Alabama case the demonstrations had no connection with beauty treatments. They were given in an establishment conducted solely as a place of dispensing cosmetics to the retail trade, and no place else. They were not given in a beauty shop, nor attendant with the

equipment usually employed there. The application of the cosmetic was casual, and only a straight chair and mirror were engaged. The "demonstration" was entirely incidental to the retail nature of the business conducted. They were not given for purposes of beautification. They were not "facials." Under this state of facts the court said:

> "But demonstrations, not carried to the point of a beauty treatment, commonly known as a 'facial' conducted with none of the equipment of the beauty parlor, nor held out as such treatment, solely to the promotion of sales, for which such demonstrations are admittedly helpful, a natural incident to the business, should not be held an evasion of the statute."

Such, however, is not the case presented to the court now. The agreed statement of facts shows an entirely different situation than that alleged in the amended complaint or dealt with in the Alabama case.

In the present case the "demonstration" is given to the public generally—those casually entering the shop or brought there by special appointment. The customer is taken into the "booth" and a "facial couch" and all equipment used in similar treatments by the ordinary beauty operator is employed. A "facial" is given. The treatment, according to the agreed statement of facts, is for the purpose of beautifying the customer. The same method, equipment, appliances and medications employed in every other similar operation is used. The "demonstration," regardless of its ultimate object is, in fact, a beauty treatment.

Why should the ordinary beauty operator, *in the sale of her services*, be required to adhere to the provisions

of the act, whereas, petitioner's "demonstrators", when doing the same thing, in the same way, in the same place and with the same equipment, lotions, creams, clays, etc., and when treating the public generally are to be excused simply because they are selling a product, rather than their services?

Logic, reason and common sense forbid such a construction.

In *State* v. *Knight*, (W. Va.) 191 S. E. 845, defendant was charged with unlawfully demonstrating cosmetics without having been licensed "as specifically set forth in the regulation adopted by the said State Committee of Barbers and Beauticians on the 11th day of March, 1935".

The regulation referred to was:

> "All demonstrators of cosmetics, permanent wave machines, and other items connected with the practice of beauty culture and barbering must be licensed as beauty operators before they work as demonstrators in the State of West Virginia."

The court said that such a regulation was unenforcible, since the legislature had not conferred authority upon the committee to adopt it. At this point the state abandoned the committee regulation and sought to uphold the conviction upon the theory that the statute created the offense without regard to the regulation. After pointing out that the statute referred only to the practice of barbering and beauty culture, and not to demonstrations, the court says:

> "The stipulation (the case was tried upon a stipulation as to the facts) does not show that a demon-

stration would necessarily involve this practice; so that the state would have us take judicial notice that it would do so. * * * Furthermore, we conceive that cosmetical demonstrations could be made to barbers and beauticians themselves, as well as to the laity, in such manner, and under such circumstances, as would not constitute a violation of the statute."

It proceeds to dispose of the case, however, upon the theory that the warrant charges no offense and, hence, cannot support conviction. This is said:

> "What the state really seeks is to have the conviction sustained upon the facts agreed, instead of upon the charge made. This is not permissible for the constitution requires that 'the accused shall be fully and plainly informed' of the offense upon which the state would convict."

That case is not very helpful. In the first place, it was decided upon the insufficiency of the charge. Whatever might have been said regarding the status of demonstrations under the act in question was pure dictum.

In the second place, the criticism regarding the failure of the "stipulation" to show the character of the demonstration is met in the instant case by a positive statement found in the agreed statement of facts before this court that the "demonstrations" were "facials" and given for the purpose of beautifying the customer.

Neither is the Opinion of the Attorney General of Indiana helpful, since it is now shown what state of facts, or what character of demonstration, was placed before him.

The case of *Luzier Laboratories* v. *Minnesota State* Board, (Minn.) 248 N. W. 664, upon which respondents rely, is "on all fours." There, plaintiff, a Missouri corporation, was engaged in the manufacture (and sale in Minnesota) of cosmetic products. It appears from the opinion that its sales representatives employed the identical sales method as was used by petitioner's "demonstrators" in the present case. The salesman solicited customers by telephone and established sales rooms in licensed beauty shops. In procuring orders the salesmen instructed the customer in the application of the merchandise by giving demonstrations on the customers as to how they were to be used. Orders were taken, and a deposit paid to the salesman, just as in the instant case. The Minnesota state board caused arrests to be made, and plaintiff sought an injunction.

The board answered that the salesmen employed the "practice of promoting sales by demonstrating the use of such goods by applying the same to the upper parts of the bodies of living persons who are prospective customers and patrons *for the purposes of beautification* by means of manual manipulation and otherwise" (italics added). It put in issue the allegations of the complaint that the salesmen did not violate the beauty culture law of that state. A demurrer to the answer was overruled and a temporary injunction was denied.

On appeal, the court held that such "demonstrations", when given for the purposes of beautification, were within the act. It was decided that the fact of the payment of a part of the purchase price to the salesmen, and the purchase of the merchandise, was sufficient under the act, since the compensation thereby contemplated need not

come directly from the one who receives the treatment to necessitate obtaining a license under its provisions.

It was also said by the court that:

> "We cannot see how the law interferes with the interstate commerce which plaintiff carries on in this state. It is free to sell its goods everywhere, but may not carry on the occupation of beauty culturist by its salesmen unless they are licensed."

This decision is in point, and should be decisive of every question raised in the present case.

Does the Statute Unreasonably Burden Interstate Commerce?

The respondents urge that the "demonstrations" are "purely local" transactions.

A simpler example will serve to illustrate. Florida has a law requiring drivers of automobiles to obtain "driver's licenses". Could it be contended with any degree of reason that a person who is engaged in the demonstration of an automobile to a prospective purchaser is excused from obtaining a driver's license simply because the sale of the automobile is an interstate transaction? Certainly not. Florida also has a law requiring doctors of medicine to take an "examination" and obtain a "license to practice medicine and surgery". Could it be contended with any degree of reason that a person who is engaged in the demonstration of surgical instruments to a prospective purchaser is excused from taking such "examination" and obtaining a "license to practice medicine and surgery" because the sale of such surgical instruments is an interstate commerce transaction, where

such demonstrations consisted of the performing of an operation? Certainly not.

The problem in the instant case is no different. The demonstration is merely to convenience the purchaser. It is only a mere incident to the sale. It is a separate, entire, and primarily local transaction from its inception to its conclusion.

One of the commonest known forms of state's rights under the sovereign power of a state is the exercise of the police power directed to the control of local conditions and exerted in the interest of the health and welfare of the citizens of the state. Practically every state police statute necessarily will affect interstate commerce in some degree, but the fact that a regulatory statute of a state, otherwise valid, is in an isolated instance effective incidentally to burden interstate commerce, does not destroy its constitutionality.

Bacon v. *Martin,* 305 U. S. 380;

Milk Control Board v. *Eisenberg Co.,* 306 U. S. 346;

Texas Co. v. *City of Tampa,* 100 F. (2) 347;

Gillett et al. v. *Florida University of Dermatology,* 197 So. 852;

Luzier Laboratories v. *Minnesota State Board,* 248 N. W. 664;

Gillett v. *Colson,* 198 So. 109.

A state, by legislation under its police power, may provide for the protection of the public health, the public morals, and the public safety, unless Congress has preempted the particular field in question or unless the state transcends its legitimate authority and undertakes

the regulation of interstate commerce by imposing burdens upon it.

Liggett Co. v. *Baldridge,* 278 U. S. 105;
Cloverleaf Butter Co. v. *Patterson,* —— U. S. ——.

The states of the union have never relinquished their sovereign power so to protect their citizens by appropriate legislation; they are only obligated to exercise their authority without encroachment upon powers delegated to the federal government and rights arising thereunder;

California Reduction Co. v. *Sanitary Reduction* Works, 199 U. S. 306;
House v. *Mayes,* 219 U. S. 270;
Watch Tower Bible & Tract Society v. *City of Bristol,* 24 Fed. Supp. 57, 305 U. S. 572.

So long as a state statute, designed to promote and protect the public health, has a real and substantial relation to that purpose, is reasonable, and operates without discrimination between subjects of the same class, it is not violative of the Fourteenth Amendment.

Missouri Pacific R. Co. v. *Humes,* 115 U. S. 520;
Watson v. *Maryland,* 218 U. S. 173;
Clason v. *Indiana,* 306 U. S. 459;
In re Wilshire, 103 Fed. 620.

A statute of the State of Maine providing that cosmetic preparations should be registered with the Department of Health was a valid exercise of police power and not an unreasonable burden upon interstate commerce.

Bourjois v. *Chapman,* 301 U. S. 183, 81 L. Ed. 1027.

A Kentucky statute imposing a tax on the receipt of cosmetics in the state by any retailer was held valid upon the theory that the word "receipt" was used in the sense that the articles had already been received by the retailer and were "now in use". It was held that the tax involved a local transaction and was not an unnecessary burden upon interstate commerce.

Bacon v. *Martin,* 305 U. S. 380, 83 L. Ed. 233.

A Virginia statute imposing a tax on peddlers was held valid as placing no unreasonable burden upon interstate commerce.

Caskey v. *Va.,* 85 L. Ed. 831, decided April 28th, 1941.

It was held that interstate commerce was not unreasonably burdened by a state statute fixing a maximum charge for handling and selling leaf tobacco, although practically all of the tobacco was shipped in interstate commerce.

Townsend v. *Yoemans,* 301 U. S. 441, 81 L. Ed. 1210.

A state statute prohibiting tobacco advertising on billboards does not violate the federal commerce clause notwithstanding posters shipped from another state.

Packer v. *Utah,* 285 U. S. 105, 76 L. Ed. 643.

Conclusion

The petition fails to present a federal question that will invoke the jurisdiction of the Supreme Court to review this case on writ of certiorari and the petitioner, likewise, has failed to disclose any authority for the issuance of the writ.

The decisions upon questions arising out of "demonstrations" of cosmetic preparations to induce purchase make a distinction between "demonstrations" which do not amount to beauty treatments (*Board* v. *Gibbons*, (Ala.) 193 So. 116) and those which do (*Luzier, etc.*, v. *Minn.*, 189 Minn. 151, 348 N. W. 664).

The agreed statement of facts shows that the "demonstrations" in the instant case are "facials", given for the purpose of beautification. Hence, the Luzier case is controlling.

Attention is called to the fact that the Florida statute requires all operators to furnish health certificates. This undoubtedly bears a real and substantial relation to the public health, safety and general welfare of the citizens of the state, yet petitioner contends that neither is this requirement applicable to its activities. State statutes exerted in the interest of the welfare of the state's citizens are upheld notwithstanding that they may incidentally involve or burden interstate commerce.

The respondents respectfully urge that the petitioner has failed to establish its right to writ of certiorari and the decision of the Circuit Court of Appeals, affirming the judgment of the District Court, is correct and should

be sustained, and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 374

UNITED ENTERPRISES, INC.,
Petitioner,

vs.

ANNE DUBEY, EVA A. LOWTHER, and LEE ORA BROWN, Being and Comprising the Members of the Florida State Board of Beauty Culture Examiners,
Respondents.

REPLY BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 374

UNITED ENTERPRISES, INC.,
Petitioner,

vs.

ANNE DUBEY, EVA A. LOWTHER, and LEE ORA BROWN, Being and Comprising the Members of the Florida State Board of Beauty Culture Examiners,
Respondents.

REPLY BRIEF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petition for reply to the brief of the respondents in opposition to the petition for writ of certiorari herein, respectfully submits the following:

I.

The petition for writ of certiorari presents a federal question requiring that the Supreme Court of the United States invoke its jurisdiction to review this cause on writ of certiorari.

The respondents ask that this petition be denied on jurisdictional grounds, and state, without assigning fact or reason that petitioner fails to set forth a federal question within Rule 38, Part 5 of the United States Supreme Court Rules. This is a bare, unsupported statement upon the part of respondents, to which they add nothing, and without something to support such conclusion, the same virtually amounts to an admission that a federal question within said rule is here presented. This cause has since its inception, sought a declaratory judgment, declaring the Florida Beauty Culture Law inapplicable to its business as an improper exercise of the police power of the State of Florida, and if applicable, violative of Article 1, Section 8, Clause 3 of the Federal Constitution and the Fourteenth Amendment thereto. This Court in measuring its own jurisdiction necessarily must take into consideration the special and important reasons for the granting of the writ herein, namely the ever-increasing efforts upon the part of the State to establish state barriers, and the ever-increasing effort upon the part of the State to impose upon simple trades and professions, despite the interstate character of their business, arbitrary and unreasonable restrictions. In the instant case, the State of Florida, through the Florida Beauty Culture Law, has attempted to establish such a state barrier, and the State of Florida has attempted to impose upon the simple trade of a salesperson, despite the interstate character of such salesperson's business, arbitrary and unreasonable restrictions. Certainly there is by this petition presented as

question of gravity and importance, justifying the exercise of this Court's jurisdiction upon the within petition.

The petitioner comes definitely within Rule 38 of the United States Supreme Court, and particularly Part 5(c) thereof.

II.

The Circuit Court of Appeals for the Fifth Circuit erroneously affirmed the judgment and decision of the District Court for the Northern District of Florida on the merits of this cause of action.

Respondents discuss a number of cases cited by the petitioner in its original brief. Discussing their criticism of the cases upon which petitioner relies:

Respondents say that the case of *Baker* v. *Daly*, 15 Fed. 2nd 881, is not in point, as no question of the right to give demonstrations was involved. No criticism is made of the reasoning of this case, nor of the rules laid down, and of which this case is a precedent. The case is in point, and is a sound determination of the very question here involved. In this case, the District Court had before it for consideration the constitutionality of the cosmetic therapy law of Oregon as applied to a person who was expert only in the waving of a woman's hair, and earned his living that way. This court held that an arbitrary attempt to group unrelated callings or professions together and to require one to qualify to perform other techniques, such as manicuring, massage, etc. was an unreasonable imposition and interference with private business, and imposed undue and unnecessary restrictions upon a lawful occupation. This case is in point for the reason that the Florida statute in question attempts to impose upon one who desires to sell cosmetics by demonstrating same

through the application of a small quantity of cold cream to the face of another be expert in many unrelated techniques, such as the removal of superfluous hair, the straightening of hair, some 70 or more in all, all having no relation to the technique of applying cold cream to the face of another. The petition herein reiterates that the case of *Baker* v. *Daly* is authority for the statement "The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose undue and unnecessary restrictions upon lawful occupations." *The case of Baker* v. *Daly is identical to the case at bar. If in the opinion of the Court in that case the words "expert only in giving a demonstration facial" were substituted for the words "expert only in the waving of hair," it would be the case at bar.*

In leveling criticism at the case of *Hoff* v. *State* (Del.), 197 Atl. 75, cited by the petitioner, a curious comment appears in the brief of the respondents: "If the petitioner was urging the invalidity of the Florida Statute, the case of *Hoff* v. *State, supra,* might be relevant * * *" The respondents have lost sight of the prayer of petitioner's original complaint herein for a declaratory judgment in the District Court of Florida. Under petitioner's own statement, admittedly the case of *Hoff* v. *State, supra,* does hold that the educational requirements and those of age and apprenticeship had no relation whatever to the public health and safety, and therefore were beyond legislative fiat. Respondents fail to criticize this holding upon this account. It is upon this ground that the same is cited in support of the petition herein.

The criticism by respondents of *State* v. *Walker,* 48 Wash. 8, 92 P. 775, 15 Anno. Cases, 257, is that the case simply held that a State statute regulating the barber trade was valid insofar as it related to the public health

and safety. Regulations not designed to promote the public health and safety were declared to be beyond the State's police power. This is exactly the position taken by the petitioner in this cause of action. In the instant case, a regulation that a person, to be licensed to sell cosmetics by the methods described in the complaint, and in the agreed statement of facts, must have spent months of study and apprenticeship in unrelated subjects and techniques, all of which had no relation to any public health problem which might be involved in the transaction incident to the sale of cosmetics.

The respondents criticize the case of *Ex Parte Lucas,* 160 Mo. 218, 61 S. W. 218, and the case of *Schneider* v. *Duer* (Md.), 184 Atl. 914, and state that neither of these decisions are pertinent except in case of an attack upon the validity of the Florida statute. Most certainly petitioner is attacking the validity of the Florida statute as applied to its business, and these decisions are authority for the unquestioned rule that a statute enacted under the police power, must bear a reasonable relation to the health question sought to be corrected.

Upon page 16 of their brief, respondents make a statement which is hardly understandable, in view of the position taken throughout the course of this cause of action by the respondents, as is disclosed by the record. This statement is as follows:

> "Some of these decisions might be relevant if this was a case where petitioner was contending that it should be relieved of certain specified requirements of the act, claimed to be invalid. But, such is not the case. Petitioner does not offer to comply with provisions admitted to be reasonable. It says that its activities are entirely beyond the reach of any of the requirements. For instance, the act requires a beauty culturist to furnish a health certificate—a requirement

admitted to be proper by all of the authorities. Yet, petitioner's representatives decline to comply with this provision. So, the cases dealing merely with specific provisions of legislation of this character are not in point."

Petitioner has heretofore in this proceeding clearly stated its position in this respect. Petitioner does not claim, nor has it claimed that it is beyond the reach of a proper police regulation. Admittedly, there may be features about its business that would justify the State in imposing some regulation in the interests of the public health. Further, if the only requirement of this act was that petitioner's representatives be required to furnish health certificates, this cause would not have been instituted. But respondents, in making this assertion in their brief have failed to point out any way by which the petitioner could do business in the State of Florida by complying with such provision, and such provision alone. The respondents have made no effort in this cause of action to point the way for the petitioner to continue to do business in Florida by complying only with such provisions of the act which petitioner admits are reasonable. The fact remains that the respondents do not wish the petitioner to do business in Florida by a compliance with the reasonable provisions of this act, but respondents seek to impose upon petitioner all the unreasonable and all the arbitrary features of this act, which necessarily precludes petitioner from doing business in Florida. Under the facts disclosed by this case, how can petitioner's representatives continue to operate in Florida? By no other means than by securing a certificate of registration or a license. This means that petitioner must comply with every single arbitrary, unfair and unreasonable regulation in this entire act. The cases cited by petitioner are in point.

It must be borne in mind with reference to the above statement appearing in respondents' brief that this was an action for a declaratory judgment. If respondents were correct and even sincere in their suggestion that the petitioner could do business in Florida without complying with these arbitrary and unreasonable requirements, the decision of the District Court, sustained by the Circuit Court of Appeals is erroneous in failing to declare this to be the case. It is manifest that the District Court and the Circuit Court of Appeals in affirming the action of the District Court, failed to grasp the full significance of the Federal Declaratory Judgments Act (Judicial Code, Section 274 d, Amended; U. S. Code Annotated, Title 28, Section 400) and to thereby enter a declaratory judgment fully declaring the rights of the petitioner to do business in the State of Florida.

In discussing the case of *Board* v. *Gibbons* (Ala.), 193 Co. 116, the respondents attempt to make some distinction between the sales methods pursued, or the technique employed by the petitioner as is outlined in the complaint and as outlined in the agreed statement of facts filed by the parties herein. This distinction, although minor, does not have any bearing upon the real issue of this case. Under the provisions of the Florida Beauty Culture Law, no such distinction is made. The act is invoked in its full force, if one applies a portion of cold cream, however small, to the face of another. If a person performs such act upon the face of another, the Florida Beauty Culture Act requires that such person be licensed or registered to practice the profession of beauty culture, meaning that such a person must have complied with all these unreasonable provisions of this act which have been pointed out in petitioner's brief, upon the merits of this petition. Petitioner again asserts that if respondents are correct and sincere in this connection, the decision of the District Court

was erroneous for failing to enter a judgment broad enough to declare that in following the sales practices outlined in the complaint, petitioner was not subject to the arbitrary provisions of the Florida Act.

The petitioner earnestly contends that this distinction is not well taken. That under the Florida Act, petitioner would be equally subject to its arbitrary provisions doing the things outlined in the complaint the same as if doing the things outlined in the agreed statement of facts.

Respondents rely upon one single case, that of *Luzier Laboratories* v. *The Minnesota State Board* (Minn.), 248 N. W. 664. Against the decided weight of authority relied upon by the petitioner, this case stands out as the single contrary authority like a "sore thumb." The *Luzier* case is founded upon a false premise, namely, there was not an improper grouping of unrelated skills and professions involved. This case should not be accorded full weight to the disregard of the unanswerable authorities cited by the petitioner.

Passing to the further proposition urged by the respondents that the statute in question does not unreasonably burden interstate commerce, respondents seek to illustrate that the demonstrations herein involved are purely local transactions. *Is not one who is involved in a purely local transaction entitled to the protection afforded him by the Federal Constitution?* Is not the right of the individual to follow a useful trade or profession free from molestation under the false guise of a public health police regulation a right so inherent that the Supreme Court of the United States should protect it in a proper action? The transaction here involved is however, not purely local. It is a part and parcel of an interstate transaction, not separate and apart.

The illustrations put forward by the rsepondents do not hold water. The illustration that an automobile sales person, demonstrating an automobile to a prospective purchaser, would be free from securing a driver's license is not an illustration appropriate to the case at bar. But if the respondents, in making such an illustration, would have added a regulation that one to demonstrate automobiles for the purpose of sale must spend months in study and appenticeship, becoming proficient not only in driving, demonstrating and selling automobiles, but in all the varied branches of the automobile industry, the illustration would have served to show how untenable respondents' position really is. The respondents make a farfetched illustration about doctors and demonstration of surgical instruments. Permit petitioner to make an illustration in this respect. Some states license foot doctors, and call them podiatrists. How valid would a regulation be, requiring all shoe salesman to be licensed as podiatrists?

The Circuit Court of Appeals for the Fifth Circuit, in their written opinion, made this statement: "The regulatory provisions of the statute are appropriate to the attainmentof the legislative object, and are not arbitrary or unreasonable." The Court was applying a proper rule to the case, but mis-applied the facts. There is more to this Florida act than a mere requirement that an applicant, for a license, submit to a medical examination. We submit that the many varied requirements, such as an applicant being proficient and learned in the following subjects: Hair cutting, manicuring, hair-straightening, dyeing of hair, cleansing of toe-nails, permanent waving, removing superfluous hair, use of chemical heat devices, and many others, are not appropriate to any health problem involved or incident to petitioner's business of selling cosmetics in Florida. May it be said again that petitioner

would not, and does not object to submitting its sales persons to medical examination. Neither does petitioner question the high purpose which led to the enactment of this law, nor does petitioner wish to debate whether or not the law as applied to the practice of beauty culture in general, in all its varied aspects, is a reasonable or unreasonable regulation.

In determining the validity of this statute in question as applied to petitioner's business and sales practices in the State of Florida, the proper test to be applied is whether the regulation imposed upon petitioner's business is a reasonable regulation, having a reasonable relation to the health problem involved in connection with petitioner's said business, so sought to be regulated. This test, properly applied to the facts of the instant case, sustains the prayer of petitioner's original complaint that a declaratory judgment be entered in this cause, fully declaring the rights and limitations of the petitioner to do business in the State of Florida.

The petitioner respectfully renews its request that the Supreme Court of the United States enter a writ of certiorari herein to the Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reversed.

Respectfully submitted,

UNITED ENTERPRISES, INC.,
Petitioner.

By THEODORE LOCKYEAR,
ELMER Q. LOCKYEAR,
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Dated at Evansville, Indiana, this 13th day of October, 1942.